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7 UNITED STATES DISTRICT COURT  
8 WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

9 PHILLIP B. HAUSKEN,

10 Plaintiff,

11 v.

12 DR. CAL COGBURNE,

13 Defendant.

Case No. C17-0198-JLR-MAT

REPORT AND RECOMMENDATION

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15 This is a civil rights action brought under 42 U.S.C. § 1983. The complaint filed in this  
16 action was one of four civil rights complaints received from plaintiff Phillip Hausken on February  
17 7, 2017. Plaintiff, who was then confined at the Monroe Correctional Complex – Special Offender  
18 Unit (MCC-SOU), asserted essentially the same claim in each of his four complaints; *i.e.*, that he  
19 was suffering serious side effects from the Haloperidol prescribed by his MCC-SOU doctor, Cal  
20 Cogburne, and that his requests to have the Haloperidol replaced with another medication had been  
21 ignored. The instant action was permitted to proceed while the three other actions were dismissed.  
22 *See Hausken v. Cogburne*, C17-195-RSL-MAT; *Hausken v. Cogburne*, C17-196-JLR-BAT; and  
23 *Hausken v. Cogburne*, C17-198-JLR-MAT.

REPORT AND RECOMMENDATION - 1

1 On March 6, 2017, the Court issued orders granting plaintiff leave to proceed with this  
2 action *in forma pauperis* and directing service of plaintiff's complaint on defendant Cogburne.  
3 (*See* Dkts. 3, 5.) Defendant Cogburne filed his waiver of service of summons on April 14, 2017,  
4 and on April 18, 2017 the MCC law librarian, having received this filing for plaintiff through the  
5 Court's electronic filing system, advised the Court that plaintiff had recently passed away. (Dkts.  
6 6, 7.) On April 24, 2017, counsel filed a notice of appearance on behalf of defendant Cogburne,  
7 and also submitted a statement noting plaintiff's death. (Dkts. 8, 9.) Defendant filed an answer to  
8 plaintiff's complaint on May 5, 2017, and included therein was a declaration by defendant's  
9 counsel that he was unable to effect service of the document on plaintiff, who was believed to be  
10 deceased, and that he had made inquiries as to plaintiff's next of kin, but was "unaware of any next  
11 of kin." (Dkt. 10 at 4.)

12 Rule 25(a)(1) of the Federal Rules of Civil Procedure provides that if a party to an action  
13 dies, and the claim is not extinguished, the action shall be dismissed as to the deceased party unless  
14 substitution is made within 90 days of the service of a suggestion of death. *See* Fed. R. Civ. P.  
15 25(a)(1). Because plaintiff's request for relief included a request for damages, plaintiff's claim  
16 was not extinguished by his death and, thus, the provisions of Rule 25 come into play.

17 In *Barlow v. Ground*, 39 F.3d 231, 233 (9th Cir. 1994), the Ninth Circuit held that Rule 25  
18 requires two affirmative steps to trigger the running of the 90-day period. "First, a party must  
19 formally suggest the death of the party upon the record. Second, the suggesting party must serve  
20 other parties and non-party successors of the deceased with the suggestion of death ...." *Id.*

21 While defendant Cogburne completed the first step of this process by filing a notice of death, he  
22 has been unable to complete the second step because, as defendant's counsel represented to the  
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1 Court in defendant's answer, he has been unable to identify any next of kin for plaintiff.<sup>1</sup> (*See*  
2 Dkt. 10 at 4.) As it appears there is no successor or representative upon whom to serve the  
3 suggestion of death, it is reasonable to deem the 90-day period triggered as of the date defendant's  
4 counsel made his representations to that effect to the Court; *i.e.*, May 5, 2017, the date defendant's  
5 answer was filed. That 90-day time period has now elapsed and no motion for substitution has  
6 been filed. Accordingly, plaintiff's complaint and this action should be dismissed with prejudice.  
7 A proposed order accompanies this Report and Recommendation.

8       Objections to this Report and Recommendation, if any, should be filed with the Clerk and  
9 served upon all parties to this suit within **twenty-one (21) days** of the date on which this Report  
10 and Recommendation is signed. Failure to file objections within the specified time may affect the  
11 right to appeal. Objections should be noted for consideration on the District Judge's motions  
12 calendar for the third Friday after they are filed. Responses to objections may be filed within  
13 **fourteen (14) days** after service of objections. If no timely objections are filed, the matter will be  
14 ready for consideration by the District Judge on September 8, 2017.

15       DATED this 15th day of August, 2017.

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18 Mary Alice Theiler  
United States Magistrate Judge

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22       <sup>1</sup> Because plaintiff was in the custody of the Washington Department of Corrections (DOC) at the time he  
23 passed away, it seems likely that the DOC, defendant's employer, would have had information regarding plaintiff's  
successors or representatives if such individuals existed.